United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2103

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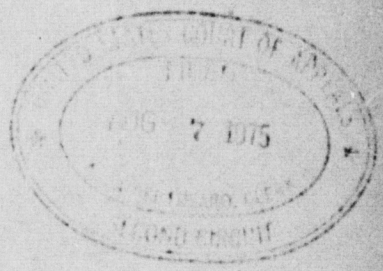
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA ex rel. NICHOLAS ABATE,

Petitioner-Appellee

-against-

BENJAMIN MALCOLM Commissioner of Corrections; WARDEN, Rikers Island Prison,

Respondents-Appellants.

On Appeal From The United States District Court
For the Eastern District of New York

BRIEF FOR PETITIONER-APPELLEE NICHOLAS ABATE

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UNITED STATES COURT OF APPEALS

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Docket No. 75-2103

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Petitioner-Appellee,

-against-

BENJAMIN MALCOLM, Commissioner of Corrections; WARDEN, Rikers Island Prison,

Respondents-Appellants.

BRIEF FOR PETITIONER-APPELLEE

QUESTIONS PRESENTED

Is it a denial of due process of law and equal protection of the law for the state courts to deny without reason bail pending appeal to a sixty-year-old defendant who has a one-year sentence, a meritorious issue on appeal, whose last criminal conviction was more than thirty years ago, who has regularly appeared in court while on his own recognizance even following conviction, who has a family and a business in New York City, and who is ill?

Does a state procedure for a stay and bail pending appeal which has no hearing, no record, no argument and no findings of fact or reasons deny a defendant due process of law?

STATEMENT OF THE CASE

Nicholas Abate is a man of sixty, who lives with his family in Queens. He has been in business for many years, and since about 1967 has run a pizza parlor. He is not well, having had three major operations in the last year. Apart from the present case, he has two criminal convictions, the most recent more than thirty years ago.

Mr. Abate was indicted in 1972 and tried in Queens County for the crimes of bribery in the second degree and possession of stolen property in the first degree. The essence of the charge was that Mr. Abate had possession of a large quantity of stolen Coca Cola syrup, and that at the time of his arrest, as the police claimed, he attempted to bribe them by offering them all his money to let him go. Both at the suppression hearing and the trial, the testimony of the police was that they received a radio call to "investigate truck" at a particular location. They did not find a truck at the location mentioned, but instead a truck-trailer at another location backed up to

a door. They entered the premises with guns drawn, where they found Mr. Abate and another man. It was there they claimed Mr. Abate offered them money*. They made an arrest and the underlying case resulted.

During the many months between indictment and trial, Mr. Abate appeared in court on many occasions, first on bail, then on his own recognizance. He once did not appear, and bail was forfeited. In the District Court, petitioner pointed out that this was due to a clerical error, and the District Attorney's office at first denied it, but in paragraph 9 of Mr. DeFelice's affidavit of July 24, 1975, that office appears at last to admit it. That the fact did not reflect adversely on Mr. Abate's regularity in appearing in court is demonstrated by the fact that the state court immediately released Mr. Abate on his own recognizance, after he had he had been on bail. He continued to appear until March of this year. By then he had appeared voluntarily more than fifty times.

On or about March 21, 1975, Mr. Abate went to trial on his indictment in Queens county. Because the case was tried some two months after the decision in Taylor v. Louisiana ____U.S._____, 42 L. Ed.2d 690 (January 21, 1975), Mr. Abate's attorney objected to the makeup of the jury

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* Mr. Abate claimed that the police actually stole from him a large amount of money, and placed the bribery charge against him when he complained.

venire, and the panel, in which only one woman appeared. Nothing was done to rectify the imbalance, and, as the District Attorney concedes (affidavit of Mr. DeFelice dated July 24, 1975 paragraph 13), "the jury that convicted petitioner. . . was selected under the old law."

After trial, on April 1, 1975, the jury acquitted Mr. Abate of bribery, having heard his account of a theft, but convicted him of possession of stolen property. He was continued at liberty until May 16, when he was sentenced by Hon Albert Buschman to one year in prison. Even then he was continued at liberty until June, having been given time to surrender.

On May 22, 1975, his counsel filed a notice of appeal, intending to rely upon the grounds of unlawful seizure and unconstitutional exclusion of women from the jury. The same day, an order was signed by a Justice of the Appellate Division, Second Department, to show cause why execution of the sentence should not be stayed, and the petitioner released on bail on his own recognizance. The information set forth in the foregoing paragraphs of this statement was supplied. The District Attorney opposed, but requested $3,500.00 bail if the application should be granted.

In accordance with Appellate Division practice, Hon. Henry Latham, the Justice to whom the motion was presented, did not consider the trial record, did not hear

argument from counsel, and did not hold a hearing. On May 30, in an order, he simply wrote the words, "the motion is hereby denied." He denied a motion to reargue, presented in even more detail, on June 17, 1975. Despite the fact that the matter was not appealable under state law, (see paragraph 7 of Mr. DeFelice's affidavit of July 24, 1975), petitioner's counsel sought a stay from a Judge of the State Court of Appeals, which was denied. On June 17, Mr. Abate surrendered to serve his sentence and on account of his ailments was taken to the Rikers Island Hospital. He has since been taken to Kings County Hospital and returned to Rikers Island.

On July 9, 1975, Mr. Abate applied for a writ of habeas corpus in the Eastern District of New York. Counsel appeared and argued that the procedure used was constitutionally deficient, and that the denial of bail was an abuse of discretion, because the petitioner was a good bail risk, had appeared in court regularly, had a short sentence* and a meritorious appeal. On July 15, 1975, Hon. Thomas C. Platt issued an order which found the procedure used insufficient, granting the writ, but staying

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* The District Attorney emphasized the fact that petitioner did not surrender on June 16. The timing of the applications shows that this was a mistake arising out of his expectation of a stay. He surrendered voluntarily the next day.

it for fifteen days to give the state court time to reconsider. Based upon an ex parte telephone call from the District Attorney, he filed a supplemental memorandum on July 22, 1975.

On July 22, 1975, petitioner's counsel went back to Justice Latham, who signed an order to show cause returnable July 28. Counsel requested argument, but the matter has never been heard or decided. In the interim, the District Attorney appealed, and sought a stay in this court. Hon. Ellsworth Van Graafeiland granted a stay without notice on July 28, 1975, before Judge Platt's order was effective. Petitioner cross-appealed, seeking grant of the writ upon the ground that the denial of bail was plainly arbitrary.

Mr. Abate continues to be in the prison hospital.

ARGUMENT

I. THE DENIAL OF BAIL PENDING APPEAL BY THE STATE COURT DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

It is well to delineate what issues are not presented by this appeal. The constitutional right to appeal, if it exists, is not at issue here. The constitutional

right to bail, if it exists, is not at issue here. What is at issue is the proposition adopted by this Court in United States ex. rel. Goodman v. Kehl, 456 F.2d 863, 868 (2nd Cir. 1972):

> '. . . under the Eighth Amendment, where bail is fixed. . . it must not be excessive, and further, where bail is not a matter of right, the [state] court may not arbitrarily or unreasonably deny bail.' United States ex. rel. Covington v. Coparo, 297 F.Supp. 203, 206 (S.D.N.Y. 1969) (Weinfeld, J.)

The New York Criminal Procedure Law (hereinafter "CPL"), 11A McKinney's Consol. Laws of N.Y. §460.50 (1971) provides for a stay of execution and for a release on bail pending appeal in a case such as that of Mr. Abate. That section refers to §530.10 of the CPL and in turn to §510.30, which set forth certain criteria for the granting of bail. The latter section is on its face applicable to bail pending appeal [see especially §510.30 (2)(a)(vi)]. Because the state statute provides machinery for bail pending appeal, the question here is whether the denial of bail by Justice Latham of the Appellate Division was so arbitrary as to deny due process or equal protection of the laws. That question, in turn, may be divided roughly into two interrelated questions, whether the procedures followed were adequate to afford Mr. Abate due process, and whether the ultimate decision to deny bail may in any rational way be supported. The District Court answered the first question, in part, but did not reach the second one.

A. The Decision of the State Court on the Issue of Bail was Arbitrary and the District Court Should Have Granted the Writ by Releasing the Petitioner on Bail Pending Appeal

It is useful to look at this case in its broadest aspect first, in relation to the merits of the bail application. The criteria set forth in CPL §510.30 (2) (a) are as follows:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vi) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(vii) If he is a defendant, the sentence which may be or has been imposed upon conviction.

As far as appeared from the record before a Justice of the Appellate Division in the papers upon the original application, the motion for reargument, and in the State Court of Appeals, as well as the District Court the

merits on each of these points were as follows:

I. Character, reputation, habits and mental condition

Petitioner lived with his family, and had been physically ill. He was in the hospital on Rikers Island after his incarceration.

II. Employment and financial resources

Petitioner had his own pizza business, run with his family.

III. Family ties and the length of his residence in the community

Petitioner lived wiht his family and was a life-long resident of New York City.

IV. Criminal record

Petitioner's last criminal conviction (one of two) was thirty years ago.

V. Previous record of responding to court appearances

Petitioner was at liberty on his own recognizance at the time of trial and was so continued even after conviction until his surrender. He appeared about fifty times voluntarily. Once when he failed to appear, due to a clerical error, his bail had been forfeited, but the matter was rectified by his being released on his own recognizance thereafter. During the time he was applying

for a stay, he failed to surrender for part of one day, and then surrendered voluntarily.

VI. The merit or lack of merit of the appeal

Almost all the papers presented to the Appellate Division concerned this issue. The petitioner presented a brief on the motion for reargument of his state bail application, which presented the outlines of the issues of law under the Fourth Amendment as well as under Taylor v. Louisiana, _____U.S._____, 42 L. Ed.2d 690 (1975) (exemption for women jurors).

Briefly, the argument under the Fourth Amendment was that the police had received a radio call to a particular location to "investigate truck". Finding no truck at that location, they found a truck-trailer at another location, where Mr. Abate was present. The officers entered the premises with guns drawn and subsequently arrested Mr. Abate. The petitioner argued that none of that afforded probable cause for the arrest, and he was at least arguably right. See Henry v. United States, 361 U.S. 98 (1959).

The District Court in its opinion emphasized the issue of exclusion of women jurors under Taylor, no doubt because the facts are scarcely in dispute. Taylor was decided in January, 1975, and invalidated a Louisiana statute exempting women. It cast into doubt the old New York

statute providing for an automatic exemption for women, N.Y. State Judiciary Law, 29 McKinney's Consol. Laws of New York, §599(7) (1967), and in fact that law was repealed in Chapter 4 of the New York Laws of 1975, McKinney's Session Law News of New York, Laws of 198th Session, 1975 Regular Session, Chapter 4, effective February 5, 1975. In his memorandum approving the bill, Id. at p. A-71, the Governor declared that "there is virtually no doubt that the provisions of the Judiciary Law repealed by the bill will eventually be declared unconstitutional under the Taylor decision." In Chapter 21 of the same session, Id. at chapter 21, the legislature passed and the Governor approved a plan for drawing additional women jurors during the time "required to call and examine new prospective jurors". Id. p. A-143. That law went into effect on March 18, 1975, and Mr. Abate went to trial a few days later. Thus the state of the law at the time of his trial was that the state courts were obliged to comply with Taylor and the legislature had provided machinery for such compliance.

Mr. Abate's lawyer objected to the jury venire, based upon Taylor, and the panel was obviously skewed against women, as the District Court noted. The trial court failed to comply with the law. In his papers in this Court, the respondent admits that "[t]he jury that convicted petitioner. . . was selected under the old law."

It is difficult to imagine a more clear-cut issue for appeal than the issue of exclusion of women from the jury which heard Mr. Abate's case. It was impossible to find that his appeal was lacking in merit under criterion VI.

VII. The sentence which has been imposed on conviction

Mr. Abate was sentenced to one year, hardly enough to cause a family man to abscond, small enough, in fact, that the sentence would be served or largely served by the time the appeal on the merits could be decided.

Under all seven of the criteria, the decision to deny bail pending appeal is inexplicable.

The federal courts have held that they have power to intervene by habeas corpus to prevent a denial of bail so arbitrary as to constitute a denial of due process. Even those courts which have denied the writ in the individual case, e.g. United States ex rel. Walker v. Twomey, 484 F.2d 874, 875 (7th Cir. 1973); United States ex rel. Cameron v. People, 383 F.Supp. 182 (E.D.N.Y. 1974), recognize that bail pending appeal provided for by statute may not be denied arbitrarily.

Using criteria similar to those set forth above, CPL §510.30(2)(a), federal courts have found the denial of state bail pending appeal arbitrary and have issued the

writ. In Dawkins v. Crevasse, 391 F.2d 921 (5th Cir. 1968), the writ was granted because the petitioner's appeal from a contempt conviction was "non-frivolous". In Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968), similarly to the present case, the petitioner had a short sentence, as well as a substantial issue on appeal concerning the right to a jury trial. Goodman v. Ault, 358 F. Supp. 743 (N.D. Ga. 1973), like this case, involved a one-year sentence, in that case for marijuana, and the writ was granted because of the likelihood that all or almost all of the sentence would be served if bail was not allowed. It is worth noting that the leading cases in which the writ was denied involved crimes of violence or otherwise of great seriousness, with long sentences, so that the denial of bail could have been justified on that ground, and there was no danger that the largest part of the sentence would be served before the appeal on the merits could be disposed of, see e.g. United States ex rel. Walker v. Twomey, supra (ten to twenty years for attempted murder; long criminal record); United States ex rel. Smith v. Twomey, 486 F.2d 736 (7th Cir. 1973) (twenty to forty years for rape and kidnapping). They were not cases like the present one, with a crime involving no violence, a substantial issue on appeal, and a short sentence.

The criteria set forth in CPL §510.30 are traditional bail standards, similar to those in the Bail Re-

form Act, 18 U.S.C. §3148. Decisions in the New York State as well as the federal courts, while not binding in a case dependent, as this is, upon the rights to due process and equal protection in the Fourteenth Amendment, indicate how arbitrary the denial of bail is in this case. Sellers v. United States 21 L.Ed.2d 64 (1968), concerned the requirement of a non-frivolous appeal. There the issue raised by the defendant of exclusion of black persons from draft boards was found to be sufficient for bail pending appeal. In United States v. Thompson, 152 F.Supp. 292 (S.D.N.Y. 1957) the injury and illness of the defendant, combined with a non-frivolous issue on appeal, was enough to meet the standards for bail pending appeal.

The New York State Courts, in their few written decisions on the statute, have reached similar conclusions. In People v. Marony, 347 N.Y.S. 2d 964 (2nd Dept. 1973), a case of bribery, Justice Shapiro found that there was some merit in the appeal, and that a large part of the sentences of some of the defendants would have been served by the time the appeal was completed. In People v. Suretsky, 325 N.Y.S 2d 31 (Sup. Ct. N.Y. Co. 1971), the defendant had a personal history similar to Mr. Abate's. He was a middle-aged family man who had appeared in court on "innumerable occasions" Id. at 34. He had a short sentence (six months), and his sole issue on appeal was one

of unlawful search. The court held that in the case of such a short sentence, bail should not be denied if "there was any question whether the conviction may be reversed," Id. at 34.

The criteria most frequently cited are the existence of a non-frivolous appeal and a short sentence. Mr. Abate certainly fulfilled those criteria, as well as others less consistently relied on. The procedures permitted by the state courts, requiring no hearing, no recitation of facts, and no reasons, permit and encourage such silent discrimination as appears in this case. One judge may have a custom of entertaining bail in all except the most heinous crimes, and another of systematically denying it. There is no way, without articulated reasons, of determining what unspoken prejudices were at work. Under the conditions of this case, the denial of bail amounts to a denial of equal protection of the laws as well as of due process, because the state courts have refused to give Mr. Abate the same treatment given to others under the same circumstances. As Judge Wright put it in United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971) cert. den. 405 U.S. 998:

> The harm done to an innocent defendant who "serves time" before his conviction is reversed on appeal cannot be undone and serves as a continuing affront to our sense of justice. There may well be times when the state is justified nonetheless in denying bail pending appeal. But when different standards are applied

> to bail applications based upon an apparently arbitrary classification, the courts are not obliged to accept hypothetical or unfounded excuses for the distinction drawn.

The evidence was that the denial was arbitrary. Any "presumption of regularity" which may have attached to the state Court's decision was dissipated by its lack of rational basis. With such a background, the federal court had the power to order the granting of bail, rather than merely sending the matter back to the state court, as Judge Platt did here. This Court should remand and direct Mr. Abate's release on the writ.

B. The Procedures Used by the State Court Were Constitutionally Inadequate

The District Attorney takes the position that the Federal Court has no power to tell a state court how to conduct its bail procedures. The preceding point establishes that that is not the law, and Wallace v. Kern, _____F. 2d _____ (2nd Cir. June 30, 1975), as the District Court noted in its supplementary opinion, is not to the contrary. That case was an affirmative class action brought to reform bail procedures for pretrial detainees. This is an application for habeas corpus for one person who seeks a stay of execution and bail or release on recognizance pending appeal. This court rejected the remedy devised in Wallace by Judge Judd partly on the basis that habeas corpus was an available remedy, Id., slip opinion at 4555.

Habeas corpus can be sought only after state remedies have been exhausted, and therefore does not pose the problems of interference with state court procedures presented by the pre-trial equitable remedies used by the District Court in Wallace. It is, in its application, tailored to the particular case and precisely to the denial of rights involved.

The other cases relied on by the District Attorney, if fully applicable, would also be insufficient to dispose of this case. In United States ex rel. Kane v. Bensinger, 359 F.Supp. 181 (D.C. Ill. 1972) aff'd sub nom United States ex rel. Walker v. Twomey, supra, it was said that the trial record might supply a reason, in the absence of stated reasons. But here the trial record was not consulted, and in any case would have led to the opposite conclusion. Similarly, in that case and its companion Walker, the seriousness of the crime might supply a reason but could not do so here.

The District Attorney fails to come to grips with the procedures used in this case under state law in the light of present due process requirements. In this case, the petitioner Nicholas Abate was at liberty at the time of his conviction; thus his liberty was being taken away by incarceration. One application is provided for, CP: §460.50(3), without provision for appeal. Under state

law, not only is no hearing provided for, but with such motions, as with all other motions in the Appellate Divisions, no oral argument is heard. McKinney's Consol. Laws of N.Y., New York Court Rules, Rules of Second Dept. §670.3 (b); Rules of First Department §600.2(d) (1974)*. No findings of fact are made, nor reasons given for decision, except by grace of the court.

Such a procedural situation encourages discriminatory and unfair bail practices. There is no way to tell what issues concerned the judge, whether he knew all the facts, whether he needed to know more, or indeed whether he took any facts into consideration at all. Finally, his decision may be as arbitrary as he pleases, because there is no review in the state system.

It is precisely such prcblems which the line of cases including Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Wolff v. McDonnell; 418 U.S. 539 , 41 L. Ed.2d 935 (1974) and United States ex rel. Johnson v. Board of Parole, 500 F.2d 925 (2nd Cir. 1974) vacated as moot, 42 L. Ed.2d 289, were designed to solve. Morrissey and Gagnon related to situations in which the persons were at liberty either on parole

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* An application to Supreme Court would have been possible, as the District Attorney points out (brief p. 8). That, however, would have been Mr. Abate's only application and would not have been appealable. The fact that the application thus made would have been made to a judge coordinate with the trial court makes this a Hobson's choice for Mr. Abate.

or probation, and the decisions emphasized the importance of the interference with that liberty as a justification for the requirements of a hearing and a statement of findings of fact and reasons. This case is like Morrissey and Gagnon in that Mr. Abate was at liberty on his own recognizance at the time of his conviction. As the court said in Morrissey:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. See People ex rel. Menechino v. Warden, 27 N.Y. 2d 376, 379 and n 2, 267 N.E.2d 238, 239 and n 2 (1971) (parole board had less than full picture of facts). And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.
> 408 U.S. at 484.

The considerations which go into deciding whether a person is a good risk for bail are similar to those cited by the Supreme Court which go into deciding whether to person ought to be continued at liberty on parole or probation. Thus this case is close both on grounds of the elements of fact-finding and infringement of liberty to Morrissey and Gagnon.

In Johnson, the petitioner was seeking parole while in prison, and in Wolff, prisoners were subjected to disciplinary hearings. Neither was concerned with the beginning of incarceration, when the individual is taken out of society. Yet Johnson noted once again the criteria for parole 500 F.2d at 390, which are similar to those for bail. This Court held that a statement of reasons for denial of parole is required, using arguments applicable in the present case. This Court said:

> a statement of reasons will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations.
> 500 F.2d at 929

and later:

> A reasons requirement "promotes thought by the decider," and compels him "to cover the relevant points" and "eschew irrelevancies." See Frankel, Criminal Sentences 40-41 (1973).
> Id at 931

and again:

> To the inmate the Parole Board's decisions are a form of arcana imperii. His liberty appears to depend entirely on the whim, hunch or caprice of panel members. He is left to speculate as to why he was denied parole. Due to the apparent inconsistencies in Parole Board decisions, "[c]orruption and chance are among the favorite inmate speculations."
> Id.at 932

All these observations are, unfortunately, true of bail applications as well.

Wolff adhered to the requirement of a "written statement by the fact-finders as to the evidence relied on and reasons for the disciplinary action." The basis for this decision was:

> as to the disciplinary action itself the provision for a written record helps to insure that administrator faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.

Petitioner submits that the requirements of Wolff are meant to be the irreducible minimum of due process. The rationale, as in Johnson, is that giving reasons will lessen fear and rumor, facilitate review, and finally that there is no good reason to refuse to give reasons. More due process ought to be required where, as here, the petitioner was at liberty when the decision was made. A hearing and findings of fact, as required in Morrissey should be the minimum.

A distinction from the cases of revocation and discipline may be attempted by the respondent-appellant upon the ground that they are all fact-finding proceedings, whereas for Mr. Abate, one great fact--conviction--is incontrovertible. Yet that fact is not the principle one in the granting of bail when the crime is not heinous. The merit of the appeal and the character of the individual

are questions of fact quite similar to those considered in the Morrissey-Wolff line of cases, and must come under the same due process requirements.

The rationale for those cases is peculiarly applicable here. It is impossible to tell upon what basis the Appellate Division decision was made. It could have been done for one of the very purposes which the grant of bail is intended to obviate: to moot the petitioner's appeal, so that the Taylor issue, coming out of Queens County criminal trials, would not be litigated. But there is no telling whether any thought, permissible or otherwise, went into the decision. When such possibilities are inherent in state procedure, are encouraged by state procedure, and no review is provided, the due process clause has been violated.

II. PETITIONER APPELLANT HAS EXHAUSTED HIS STATE REMEDIES

The District Attorney has argued that petitioner had not exhausted his remedies because his counsel had not perfected the appeal. The appeal, however, is not a remedy for bail pending appeal. In fact Mr. DeFelice said in his affidavit of July 24, at paragraph 7 that the application for a stay and bail was not appealable. In any case, the denial of the application to Judge Fuchsberg of the State Court of Appeals definitively exhausted all state remedies.

III. THE DISTRICT COURT'S ORDER WAS NOT FINAL

This matter is not appealable because the order below was not final. Judge Platt wanted some rational decision from the state court, and in fact petitioner sought to get that decision by reapplying to the Appellate Division. If such a decision were rendered, that would have mooted the case. See Andrews v. United States, 373 U.S. 334, (1963); but see Gray v. Swenson, 430 F.2d 9 (8th Cir. 1970).

CONCLUSION

The words of Justice Jackson, sitting as Circuit Justice on a bail application in Williamson v. United States, 184 F.2d 280, 284 (2nd Cir. 1950) are apposite here:

> All experience with litigation teaches that existence of a substantial question about a conviction implies a more than negligible risk of reversal. Indeed this experience lies back of our rule permitting and practice of allowing bail where such questions exist, to avoid the hazard of unjustifiably imprisoning persons with consequent reproach to our system of justice.

This Court should order the Court below to issue the writ, forthwith, or at the very least, affirm the decision below.

Respectfully submitted,

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